

NO. 78-5290

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT EMERSON EZZELL,

Appellant,

v.

LOS ANGELES COUNTY  
DEPARTMENT OF ADOPTIONS,

Appellee.

On Appeal From the Supreme Court  
of the State of California

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of California on the ground that the issues on which the decision of the cause depends present no substantial federal question.

I

NATURE OF THE CASE

This appeal arises from a 1975 judgment freeing the subject child from the custody and control of the Appellant, after a trial on the merits, and giving custody of the child to Appellee for the purposes of adoptive placement. The Supreme Court of California affirmed, and its opinion outlines the underlying facts so that the

need not be repeated here. In re Richard E. (1978) 21 Cal.3d 349. Following affirmance, the adoption of the subject child was completed by the family with whom he had been living since early 1976.

A review of the subject opinion discloses that the California Supreme Court based its decision solely on interpretation of California statutes. Only in passing, and as part of the natural flow of the opinion, does the Court refer to Federal authorities, distinguishing the case at bar where a child is freed from parental custody in order to allow his adoption from a situation where a minor faces possible loss of liberty in a juvenile court delinquency setting.

The California Supreme Court decision then is based strictly on non-Federal grounds. No Federal statute is in question. Nevertheless, Appellant raises four issues on this appeal, which are addressed below.

II

ARGUMENT

A. CONSTITUTIONALITY OF CALIFORNIA

CIVIL CODE § 232(a)(4)

Appellant attacks the constitutionality of California Civil Code § 232(a)(4) arguing that it is deficient in that it does not require proof of a compelling state interest sufficient to justify severance of parental rights.

The opinion below does not directly address and decide this issue. It is clear, however, that California Civil Code § 232 must be read in conjunction with California Civil Code § 4600 which

sets forth the "parental preference doctrine" and states that a parent may be deprived of the custody of his child only upon a showing that continued custody would be detrimental to the child. In re B. G. (1974), 11 Cal.3d 679; 523 P.2d 244. This requirement satisfies the need for a showing that there be a "powerful countervailing interest" before parental custody is denied. Stanley v. Illinois (1972), 405 U.S. 645; 31 L.Ed.2d 551.

The opinion below holds that the necessary finding of "detriment" was made by the trial court. In re Richard E., *supra*, at 356-357. Furthermore, Appellant was afforded his due process rights of notice, appointed counsel, and a hearing on the merits. Appellant's contentions on this issue, Appellee submits, are meritless.

#### B. AMENDMENT OF THE STATUTE DURING THE PENDENCY OF THE APPEAL

During the pendency of this protracted appeal, California Civil Code § 232(a)(4) was amended by the California Legislature. Appellant now belatedly raises the point before this Court. This issue was not timely raised by Appellant in the California courts, and the California Supreme Court specifically did not decide it. In re Richard E., *supra*, at 363. Appellant is thus precluded from raising it at this stage of the proceedings. Bailey v. Anderson (1945) 326 U.S. 203; 90 L.Ed. 3.

#### C. APPOINTMENT OF INDEPENDENT COUNSEL FOR THE MINOR

Appellant attempts to bring into issue the question of a

minor's constitutional right to independent counsel in the context of these proceedings. Appellee submits, however, that Appellant has no standing before this Court to assert the rights of a third party, the minor child. Baker v. Carr (1962) 369 U.S. 186; 7 L.Ed. 2d 663.

Appellant, in any case, has cited no authority for the proposition that minors, in the context of termination of parental rights for the purpose of adoptive placement, have an absolute right to independent counsel. Indeed, there is authority to the contrary. Matter of D., (1976) Or.App., 547 P.2d 175, rev. denied 1976, certiorari denied 429 U.S. 907.

Additionally, the opinion below addresses primarily the interpretation to be given to the California statute that provides for appointment of counsel for minors at the discretion of the trial court. Such construction of state statutes is non-reviewable by this Court.

#### D. ADEQUACY OF APPELLANT'S TRIAL COUNSEL

The last issue raised by Appellant herein concerns the adequacy of his trial counsel. It is clear however that this question is not reviewable by appeal, but by certiorari.

Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(1) and § 1257(2). The former is manifestly inapposite, since no treaty or statute of the United States is in question. The latter could arguably be a basis for jurisdiction of the first three issues, were it not for the infirmities set forth earlier. However, the adequacy of Appellant's trial counsel involves

1 the validity of no California statute, and thus this Court's  
2 jurisdiction could only be grounded upon 28 U.S.C. § 1257(3), which  
3 Appellant does not invoke.

4 In any case, the opinion below does not allude to this  
5 particular issue. That is understandable, since Appellant bases his  
6 claim that he was inadequately represented at trial on tortured  
7 misconstruction of California Civil Code § 233 and § 234 which  
8 he claims trial counsel should have followed. These points were  
9 held to be without merit in the intermediate appellate courts, and  
10 the California Supreme Court affirmed in the sense that it apparently  
11 found the issue too meritless to discuss.

12  
13 III

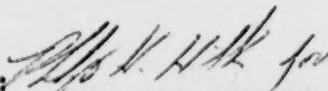
14 CONCLUSION

15 Wherefore, Appellee respectfully submits that the questions  
16 upon which this cause depends are so unsubstantial as to merit no  
17 further argument, and Appellee respectfully moves this Court to  
18 dismiss this appeal, or, in the alternative, to affirm the judgment  
19 entered in the cause by the Supreme Court of California.

20 DATED: Nov. 22 1978

Respectfully submitted,

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23 By:   
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26 Attorneys for Appellee  
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